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Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U.S.
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NOS. 71-777 AND 71-807

NO. 71-777

ROBERT E. CLEVELAND and FRANCES H. CLEVELAND, etc.,
Petitioners,

v.

ILLINOIS BELL TELEPHONE COMPANY, an Illinois Corporation, and UNITED STATES OF AMERICA,
Respondents.

NO. 71-807

ROBERT C. AGRON,
Petitioner,

v.

ILLINOIS BELL TELEPHONE COMPANY, et al.,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT ILLINOIS BELL TELEPHONE COMPANY IN OPPOSITION

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January 31, 1972

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BRIEF OF RESPONDENT ILLINOIS BELL TELEPHONE COMPANY IN OPPOSITION

Illinois Bell Telephone Company (Illinois Bell) opposes granting the writs of certiorari in Nos. 71-777 and 71-807 and for its reasons respectfully states:

STATUTES INVOLVED

In addition to the statutes referred to by petitioners, the following Illinois statutes and Internal Revenue Service rulings are involved: Section 8-11-2 of the Illinois Municipal Code (24 Ill. Rev. Stat. (1969) §8-11-2), Sections 467.1 and 467.2 of the Illinois Messages Tax (120 Ill. Rev. Stat. (1969) §§467.1-467.2), Section 36(a) and (b) of the Illinois Public Utilities Act (111⅔ Ill. Rev. Stat. (1969) §36(a), (b)), and Internal Revenue Service Rulings dated August 2, 1948, March 15, 1968, and March 31, 1969. These statutes and rulings are set out in the Appendix hereto.

STATEMENT

These petitions arise from a unanimous and well-reasoned decision of the United States Court of Appeals for the Seventh Circuit holding that the federal communications excise tax was "properly computed" (A. 5a)[1] and that the petitioners were not entitled to refunds. In No. 71-807, a challenge to the method of computing the federal tax was initiated by petitioner Robert C. Agron (Agron) who sought a refund of federal taxes allegedly overcollected from him by respondents. Agron's theory was that the federal tax on Illinois Bell's customers was overcollected to the extent that the base for taxation included amounts that customers paid under supplemental schedules filed by Illinois Bell with the Illinois Commerce Commission to recover the expenses of certain municipal occupation taxes and of part of the state Messages Tax imposed upon Illinois

[1] The Appendix to the *Agron* petition (No. 71-807) will be referred to herein as "A..." Illinois Bell's opposition to the *Cleveland* petition (No. 71-777) is treated separately beginning at p. 16, *infra*. Since the issues in *Agron* and *Cleveland* are essentially similar, much of the following statement is relevant to both cases. The Court of Appeals issued a single opinion.

Bell. The Court of Appeals, after considering the Illinois statutes and decisions involved, concluded that the state and local taxes are imposed upon Illinois Bell, not upon its customers (A. 6a-9a). Since Illinois Bell's charges to its customers to recover the expenses resulting from those taxes are made pursuant to schedules filed with the Illinois Commerce Commission (A. 13a), the Court of Appeals held that the computation and collection of "the tax imposed by section 4251 of the Internal Revenue Code does not result in any overassessment of the federal tax and . . . the district court erred in granting a tax refund to Agron" (A. 16a).

Having concluded that the federal tax was properly assessed, the Court of Appeals found it unnecessary to consider the other issues raised by Agron. These dealt with the district court's decision dismissing Counts II and III of Agron's complaint for want of jurisdiction. In Count II, Agron sought a refund from the United States on behalf of all Illinois Bell customers similarly situated on the basis of the same alleged overassessment. Illinois Bell was named as a party allegedly necessary for class relief. The district court held that Agron's "class action for tax refunds may not be maintained" because all members of the class did not file refund claims (A. 24a), that the "attempted joinder of a private litigant in a tax refund action is improper" (A. 25a) and that "since the relief to which plaintiff is entitled may occur without the involvement of IBT," Illinois Bell is "obviously not necessary in order to achieve a just adjudication" (*id.*). In Count III, Agron sought relief on behalf of members of the same class on the theory that they could file a derivative action on behalf of Illinois Bell against the United States. The district court denied the class relief and held that Illinois Bell "had no claim to press against the Government" since the federal tax "is imposed on telephone customers" not upon Illinois Bell (A. 25a) and since the obligation of Illinois Bell is "the collec-

tion and holding of certain tax revenues according to federal statutes, 26 U.S.C. §§4291, 7501(a) and policy" (A. 26a).

In challenging the propriety of the assessment and collection of the federal tax, Agron treats in a most summary and misleading fashion the terms of the federal statute and the Illinois statutes and court decisions relied upon by the Court of Appeals.

Under Illinois law, Illinois Bell is required to set forth all rates or charges for intrastate telephone service in schedules filed with the Illinois Commerce Commission (111⅔ Ill. Rev. Stat. (1969) §§ 36, 37). The schedules filed by Illinois Bell setting forth rates for telephone service are designed to recover all of the costs incurred by Illinois Bell in providing telephone service within Illinois, and a fair return on investment. *Illinois Bell Telephone Co.* v. *Illinois Commerce Commission,* 414 Ill. 275, 286, 111 N.E. 2d 329, 335 (1953).

It is an elementary principle of public utility rate regulation that taxes imposed upon a public utility are one of the expenses normally considered in determining the proper level of rates to be charged by that utility. As this Court has pointed out, "a proper allowance for taxes" is "normally included as a cost of service" in determining rates. *FPC* v. *United Gas Pipe Line Co.,* 386 U.S. 237, 243 (1967). Similarly, in Illinois Commerce Commission rate proceedings, various municipal, state and federal taxes imposed upon a telephone company are among the expenses included in determining the rates to be charged by that company. *E.g., Illinois Bell Telephone Company Proposed Advance in Rates,* 32 Ill. Comm. Comm'n. 149, 154-155 (1953). Since taxes imposed upon Illinois Bell are expenses for rate-making purposes just as are the costs of labor, materials and capital, the economic burden of all such taxes

is ultimately borne by Illinois Bell's customers through the rates charged for telephone service (A. 7a, 12a).

Among the various taxes imposed upon Illinois Bell which are recovered through the rates Illinois Bell charges its customers are municipal occupation taxes and the state Messages Tax. In 1955, Illinois enacted provisions authorizing municipalities to impose an occupation tax upon "persons engaged in the business of transmitting messages" (24 Ill. Rev. Stat. (1969) § 8-11-2). The tax is not to exceed 5 percent of the gross utility receipts from business originating within the municipality imposing the tax (*id.*). At the present time, many Illinois municipalities, including Chicago, have elected to impose an occupation tax upon Illinois Bell (A. 2a). In 1965, Illinois increased the state Messages Tax, which is measured by a telephone company's gross receipts, from 3 percent to 4 percent, and in 1967, from 4 percent to 5 percent (120 Ill. Rev. Stat. (1969) § 467.1 *et seq.*). Like the municipal occupation taxes authorized by the state, the Act imposing this state gross receipts tax makes it clear that the "taxpayer" is a "person engaged in the business of transmitting messages" (120 Ill. Rev. Stat. (1969) §467.1). (A. 2a, 6a)[2]

[2] The Illinois Department of Revenue has ruled that both the municipal occupation taxes and the state Messages Tax are imposed upon Illinois Bell and not upon its customers. The Department has stated that the municipal taxes are "occupation taxes whose legal incidence fall on . . . the person engaged in the business of transmitting messages. . . . They are not taxes which are levied on the customer . . ." (Bulletin accompanying March 14, 1956, amended Article 10 of Illinois Messages Tax Regulations). The Department has stated that the state Messages Tax "is imposed upon persons engaged in the business of transmitting messages in this State . . . and is not imposed upon persons for whom services within the Act are rendered by such taxpayers . . ." (Article 10b of Illinois Messages Tax Regulations).

Since these two gross receipts taxes imposed upon public utilities directly increase the costs of operation of the utilities, Illinois adopted a procedure to permit utilities expeditiously to recover the expenses resulting from the imposition upon them of these taxes. Instead of requiring Illinois Bell and other utilities to initiate a general rate proceeding to recover the additional expenses resulting from the enactment of the municipal taxes and the increase in the state Messages Tax above 3 percent, the Illinois statutes provide that utilities may file supplemental schedules to recover the expenses resulting from the imposition of these taxes and that such schedules may not be suspended pending Illinois Commerce Commission review (111⅔ Ill. Rev. Stat. (1969) § 36(a), (b)).

Paragraph (a) of Section 36 of the Illinois Public Utilities Act, which was added at the time municipalities were authorized to impose occupation taxes, applies "whenever a municipality pursuant to Section 8-11-2 [of the Municipal Code] . . . imposes a tax on any public utility. . . ." Under the procedures established in paragraph (a), a public utility "may charge its customers" to recover such municipal occupation tax expenses by filing "with the Commission a supplemental schedule applicable to such municipality which shall specify such additional charge." Paragraph (b) was added to Section 36 when Illinois raised the Messages Tax rate above 3 percent. Like paragraph (a), paragraph (b) permits a telephone company to recover the expense resulting from any increase above 3 percent in the Messages Tax by filing a supplemental schedule which sets forth an additional charge to its customers equal to the amount of the increase and such schedules may not be suspended pending Commission review (A. 3a, 4a).

In contrast to the municipal occupation taxes and the state Messages Tax which are imposed upon Illinois Bell,

the federal communications excise tax is imposed upon the customers of telephone companies. Section 4251 of the Internal Revenue Code provides that the excise tax "shall be paid by the person paying for the services" (26 U.S.C. § 4251(a)(1)). While the federal tax has been in effect, and until it is phased out pursuant to a recent act of Congress,[3] Illinois Bell is required to collect the federal excise tax which is imposed upon its customers, and in so doing, acts in a purely ministerial capacity pursuant to directions of the Internal Revenue Service (26 U.S.C. § 4291; see I.R.S. rulings in Appendix, *infra*). Illinois Bell is required to hold the federal taxes paid by and collected from its customers as "a special fund in trust for the United States" (26 U.S.C. § 7501(a)), and it pays over the amounts so collected each month to the Internal Revenue Service (26 C.F.R. § 49.6302(c)-1).

The federal tax applies to "all charges" paid by Illinois Bell customers for access to several types of service, including "local telephone service" and "toll telephone service" (26 U.S.C. § 4254(a)(1)). "Local telephone service" is defined in the Code as "the access to a local telephone system, and the privilege of telephonic quality communication. . . " (26 U.S.C. § 4252(a)(1)). The question of what a telephone customer must pay to obtain access to the telephone system is a matter of state law. As a public utility, Illinois Bell has a duty under Illinois law not to "charge, demand, collect or receive a greater or less or different compensation . . . for any service rendered or to be rendered, than the rates or other charges applicable to such . . . service as

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[3] On December 31, 1970, Section 4251 was amended to provide for the complete elimination of the federal communications excise tax in a series of steps (P.L. 91-614). The rate of tax will remain 10% until January 1, 1973, at which time it will decrease 1% each year until January 1, 1982, after which the tax will not be imposed.

specified in its schedules on file and in effect at the time . . ." (111⅔ Ill. Rev. Stat. (1969) §§ 37, 39). Thus Illinois law provides that no Illinois Bell customer may have access to the telephone system unless he pays all charges pursuant to schedules filed by Illinois Bell with the Illinois Commerce Commission, including supplemental schedules filed with that Commission to recover the expenses of municipal occupation taxes and of part of the state Messages Tax imposed upon Illinois Bell. Since these municipal and state taxes imposed on Illinois Bell are expenses to be recovered through charges to its customers under schedules and supplemental schedules approved by the Illinois Commerce Commission, and since Illinois Bell customers must pay these charges to have access to the telephone system under the Illinois Public Utilities Act, the Court of Appeals has held that such charges are amounts paid for telephone service as defined in the Internal Revenue Code (26 U.S.C. §4252(a)(1)).[4]

THERE IS NO REASON FOR GRANTING THE WRIT IN NO. 71-807

1. The Court of Appeals unanimously and correctly concluded that the municipal occupation taxes and the state Messages Tax are imposed upon Illinois Bell, not upon its customers, and that charges to customers to recover ex-

[4] Illinois Bell had no discretion in including the amounts charged under supplemental schedules in the base upon which the federal communications excise tax is computed. This assessment was required by three directives of the Internal Revenue Service, dated August 2, 1948, March 15, 1968, and March 31, 1969, all of which are set forth in the Appendix hereto. Agron's assertion that "the IRS fashioned its special 1969 tax ruling for this case long after this litigation had begun in 1967" (Petition, p. 10), is simply untrue, since the 1969 ruling merely reaffirmed the principles set forth by the Internal Revenue Service in its ruling issued in 1948—over 20 years earlier.

penses incurred by Illinois Bell due to those taxes are charges for communications service (A. 12a). Thus, the court held these charges to be properly includable in the base upon which the federal communications excise tax is assessed. The court resolved the controlling question of state law—the nature of the charges made by Illinois Bell to recover the expenses of the state and local taxes imposed upon it—by applying relevant Illinois statutes and court rulings (A. 6a-9a).[5]

Agron's contention that "the court below never really considered" (Petition, p. 5) whether the charges of Illinois Bell to recover the expenses of the state and local taxes imposed upon it are charges for communications services within the federal statute cannot be reconciled with the Court of Appeals' decision, which considered and decided precisely that question (A. 12a, 13a-14a, 15a). After reviewing the "clear language of the Illinois statutes" and decisions of "the Illinois courts" showing that the state and local taxes are imposed upon Illinois Bell (A. 6a-7a), the Court of Appeals held that "amounts paid to reimburse IBT for its payment of the state and local messages taxes—just as amounts paid to reimburse IBT for all other taxes and for labor costs and equipment repairs—are paid for telephone service within the meaning of the [federal communications excise tax] statute" (A. 12a; see also A. 15a). Moreover, the court's holding that Illinois Bell's charges were properly includable in the federal tax base was unaffected by the separate statement of those charges by Illinois Bell on its customers' bills, since "neither IBT nor . . . Illinois can defeat that result by providing for the

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[5] The Court of Appeals' decision is also completely consonant with subsequent decisions of the Illinois Supreme Court concerning the incidence and computation of taxes: See *Martin Oil Service, Inc.* v. *Department of Revenue*, 49 Ill. 2d 260, 273 N.E.2d 823 (1971).

itemization of those amounts passed on to customers which are attributable to taxes on IBT" (A. 14a).

There is no conflict between the decision of the Court of Appeals and any other decision construing the federal communications excise tax, the only federal statute at issue here. Further, the decision amply confirms a consistent series of Internal Revenue Service rulings dating back 20 years (see Appendix hereto). For these reasons, there is no merit whatever in Agron's attempt to have this Court review the judgment of the Court of Appeals.

2. In view of its dispositive holding that the computation and collection of "the tax imposed by section 4251 of the Internal Revenue Code does not result in any overassessment of the federal tax" (A. 16a), the Court of Appeals stated "we intimate no opinion on the correctness of the district court's dismissal of Counts II and III" (*id.*). However, the district court was clearly correct in holding that Agron's class action for a tax refund could not be maintained, that Illinois Bell could not be joined with the Government in a tax refund action and that Illinois Bell was not a necessary party to accord Agron any relief to which he might be entitled.

In an effort to invoke this Court's discretionary jurisdiction, Agron erroneously asserts that the question of whether a class action for a tax refund can be maintained, where, as here, each member of the purported class has not filed a claim for a refund, "has given difficulty to lower federal courts" (Petition, p. 13). Section 7422(a) of the Internal Revenue Code is unequivocal in its requirements concerning the filing of refund claims (26 U.S.C. §7422(a)):

> "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax . . . until a claim for a refund or credit has been duly filed with the Secretary . . . according to the provisions of law . . . and the regulations of the Secretary. . . ."

Moreover, every court which has considered this provision has ruled, as the district court did here, that a class action for a tax refund cannot be maintained on behalf of a purported class member who has not filed a properly documented refund claim.

The courts have uniformly held that each member of a class suing for a refund of federal taxes must have filed a proper claim for a refund in order for the suit to be maintained. For example, *Harkins* v. *United States*, 66-2 U.S.T.C. ¶9543 at 86,701 (E.D. Okla. 1966), *aff'd. on other grounds*, 375 F.2d 239 (10th Cir. 1967), involved a class action for a tax refund filed on behalf of the named plaintiffs, a husband and wife, "and for all those members of the Five Civilized Tribes similarly situated" to recover taxes on allegedly non-taxable income (*id.*, at 86,702). The plaintiff there contended that "all of the unnamed plaintiffs . . . and the amounts of refund due them are identifiable in the Internal Revenue Service files . . . and to require them to file individual claims for refund would be to unjustly enrich defendant at their expense . . ." (*id.*). The court granted the Government's motion to dismiss on the ground, among others, that "suit was filed without a proper claim for refund having been filed. The Treasury Regulations do not permit an unauthorized agent to claim an unspecified refund for unknown principals" (*id.*).

Similarly, in *McConnell* v. *United States*, 295 F. Supp. 605 (E.D. Tenn. 1969), the court refused to permit the named plaintiffs, a husband and wife, to maintain a tax refund action on behalf of the class of the striking employees of a company and their spouses. The members of the purported class had not filed claims for refunds. The court ruled that "before any taxpayer may maintain any action to recover any internal revenue tax . . . it is an absolute and indispensable prerequisite that such taxpayer shall have filed a claim for refund . . ." (*id.*, at 606).

This Court's decision in *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951), lends no support to Agron's contention that "even if Rule 23 could be construed as an extension of the jurisdiction of the court [over tax refund actions]—which it is not—this authority was plainly granted by Congress in 28 U.S.C. §1346(a)(1)" (Petition, p. 17). *Yellow Cab* involved tort claims, jurisdiction over which is exclusively in the district courts under Section 1346(b). In contrast, the jurisdiction over actions seeking refunds of federal taxes is governed by Section 1346(a)(1) of the Judicial Code (28 U.S.C. §1346(a)(1)). That section establishes jurisdiction which is to be "concurrent with the Court of Claims" in "any civil action against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected" (*id.*).

In *United States* v. *Sherwood*, 312 U.S. 584 (1941), this Court considered the scope of concurrent jurisdiction such as that granted in Section 1346(a) to the district courts and the Court of Claims over certain actions, including those for a tax refund, brought against the United States.[6] Since the jurisdiction of the Court of Claims "is confined to the rendition of money judgments in suits brought for that relief against the United States," this Court concluded that "if the relief sought is against others than the United States the suit as to them must be ignored as beyond the jurisdiction of the court . . ." (*id.*, at 588).[7] Moreover, this Court

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[6] The action was brought pursuant to 28 U.S.C. §41(20). That section was reenacted in substantially identical form as 28 U.S.C. §1346(a)(2), which in turn confers concurrent jurisdiction in a form identical to that conferred by 28 U.S.C. §1346(a)(1).

[7] The Court in *Yellow Cab* noted that the scope of the jurisdiction granted by the Tort Claims Act is quite different from and "substantially broadens the jurisdiction of the District Courts as compared to that provided by the Tucker Act" which was involved in *Sherwood* (340 U.S. at 552).

specifically rejected an argument that the Rules of Civil Procedure expanded the limited and strictly defined jurisdiction of actions against the United States where the jurisdiction of the district court is concurrent with the Court of Claims (*id.*, at 591):

> "The matter is not one of procedure but of jurisdiction whose limits are marked by the Government's consent to be sued. That consent may be conditioned, as we think it has been here, on the restriction of the issues to be adjudicated in the suit, to those between the claimant and the Government. The jurisdiction thus limited is unaffected by the Rules of Civil Procedure, which prescribe the methods by which the jurisdiction of the federal courts is to be exercised but do not enlarge the jurisdiction."

In these circumstances, it is clear that the district court correctly held that Rule 23 does not avoid the jurisdictional prerequisite to maintaining a tax refund action that each individual seeking such a refund must have filed a claim for a refund before instituting suit. Agron's contention that this prerequisite is unnecessary "where, as here, there is involved only an issue of law and there is nothing of an administrative nature to be done" (Petition, p. 18) is plainly incorrect. As the court pointed out in *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555, 567 (2d Cir. 1968), judicial intervention is only appropriate in situations where there is "no public administrative body that could ensure repayment, so the responsibility must ultimately rest on the judicial system." However, here the Internal Revenue Code has established a procedure for passing upon claims for refunds of federal taxes and hence judicial intervention in

the absence of filing such claims is both unnecessary and inappropriate.[8]

3. Agron asserts that he "does not argue . . . but reserves" (Petition, p. 3) the issues respecting the district court's rulings that the "attempted joinder of a private litigant [Illinois Bell] in a tax refund action is improper" and that the joinder of Illinois Bell "is obviously not necessary . . . to achieve a just adjudication" (A. 25a). Even if this Court were to consider whether to review these issues, such review would not be warranted because the district court's decision dismissing Illinois Bell as a party was plainly correct. This Court's decision in *United States* v. *Sherwood, supra*, establishes that the joinder of a private litigant with the United States in actions for the recovery of money from the United States is improper where, as in tax refund actions, there is concurrent jurisdiction between the district courts and the Court of Claims.[9]

In asserting that Illinois Bell's joinder "was necessary and proper" (Petition, p. 3), Agron sets forth a series of assertions concerning Illinois Bell's record keeping and retention procedures which have no support whatever in the record. Basically, Agron argues that Illinois Bell is a necessary party because "administratively a refund will be

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[8] Agron's reliance upon *Oatis* v. *Crown Zellerbach Corp.*, 398 F. 2d 496 (5th Cir. 1968), to support his contention that "the exhaustion doctrine has been satisfied" (Petition, p. 18) is misplaced. That case involved discriminatory employment practices and a complaint brought under Title VII of the Civil Rights Act, establishing an administrative agency which can only endeavor to effect voluntary conciliations and has no power to award damages or to grant injunctive relief (42 U.S.C. §2000(e) *et seq.*).

[9] The rule enunciated in *Sherwood* has been followed in tax refund actions and required that Illinois Bell be dismissed as a defendant in the district court. See, *e.g.*, *De Van* v. *United States*, 50 F. Supp. 992 (D.N.J. 1943).

most feasible if carried out through IBT" (*id.*, at 4). As is shown in the detailed affidavit of Mr. R. H. Phelps submitted by Illinois Bell in the district court, however, Illinois Bell does not maintain records of the amounts that would be due under Agron's theory from the United States as a refund to each Illinois Bell customer. That affidavit also shows that although Illinois Bell does maintain records from which the amounts of disputed federal tax could be approximately calculated by subscriber for the most recent six-month period, the cost to Illinois Bell of such an undertaking would far exceed the gross amount of the disputed federal tax for that period (Phelps Aff., pp. 61-62[10]). And for any period beyond the most recent six months, Illinois Bell only retains summary records which would be of no use whatever in the determination of individual refunds (*id.*, at 53-56).

Agron has never offered any evidence disputing these facts. Moreover, there is no showing that other Illinois Bell customers cannot pursue the administrative machinery established by the Internal Revenue Service for passing upon refund claims. Contrary to Agron's assertion, those of Illinois Bell's customers who are interested in claiming a refund are, like Agron, in a better position than Illinois Bell to determine the amount of such a refund. Thus, there is no basis for abandoning the established administrative refund machinery of the Internal Revenue Service and substituting in its place an extra-statutory refund process supervised by the judiciary. The district court's decision that there is no basis for involving Illinois Bell in this dispute between Agron and the Government would not warrant review even if this Court were to decide to review the Court of Appeals'

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[10] Page references to Mr. Phelps' affidavit are to the Joint Appendix in the Court of Appeals.

decision on the propriety of the assessment of the federal communications excise tax.[11]

THERE IS NO REASON FOR GRANTING THE WRIT IN NO. 71-777

The Court of Appeals correctly affirmed the district court's decision dismissing the complaint of Robert E. and Frances H. Cleveland (Cleveland) (No. 71-777). Like the complaint in *Agron,* Cleveland erroneously alleged "that state and municipal taxes are not proper charges to be included in determining the federal tax base . . . thereby entitling plaintiffs to a refund" (A. 25a).[12] However, Cleveland did not file any claim for a refund with the Internal Revenue Service.

Cleveland's action was originally commenced against Illinois Bell alone in October, 1969, in the Circuit Court of Cook County, Illinois. Since Cleveland's state court complaint questioned the proper method of assessing the fed-

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[11] The district court correctly dismissed Count III of Agron's complaint, which was "in the nature of a class derivative action brought on behalf of IBT, plaintiff's theory being that IBT breached its fiduciary duty to the class to prevent its subscribers from being overcharged" (A. 25a). The same jurisdictional defects in Count II—improperly seeking to bring a class action for a tax refund and improper joinder—also required dismissal of Count III (*id.*). Moreover, since the federal tax is not imposed upon Illinois Bell and its role in the collection and assessment of that tax is purely ministerial, Illinois Bell "had no claim to press against the Government" (*id.*). Finally, consideration of Count III is barred by the doctrine of *res judicata,* since the same issue involved in Count III was unsuccessfully litigated by petitioner in a prior case—*Agron* v. *Illinois Bell Telephone Co., et al.* (No. 67 C 2041, N.D. Ill. Aug. 4, 1969).

[12] This reference to the Appendix and all others in the remainder of the brief are to the Appendix to the *Cleveland* petition and will be referred to as "A. . ."

eral communications excise tax and sought a refund of amounts allegedly improperly collected, Illinois Bell filed a timely petition, pursuant to 28 U.S.C. §1441, to remove the action to the United States District Court. The district court denied Cleveland's motion to remand (A. 24a-27a) and subsequently dismissed Cleveland's complaint on motion of Illinois Bell and the United States (A. 27a-29a).

The Court of Appeals held that since "IBT properly computed the federal tax in accordance with the provisions of the Internal Revenue Code, the underlying basis of the Clevelands' complaint falls" (A. 15a). While the Court of Appeals did not pass upon the other issues raised by Cleveland, the district court had properly dismissed Cleveland's complaint for failure to file any claim for a refund before instituting his action. No basis has been advanced in his petition for reviewing that judgment.

Despite the requirement of Section 7422(a) that "no suit . . . shall be maintained in any court for the recovery of any internal revenue tax . . . until a claim for a refund . . . has been duly filed . . ." (26 U.S.C. § 7422(a)), Cleveland by his own admission failed to file any claim for a refund before instituting this action. In *United States* v. *Felt & Tarrant Manufacturing Co.*, 283 U.S. 269, 272-273 (1931), this Court held that "the filing of a claim . . . as a prerequisite to a suit to recover taxes paid is a familiar provision of the revenue laws, compliance with which may be insisted upon . . ." and also emphasized that "the necessity for filing a claim such as the statute requires is not dispensed with because the claim may be rejected."

Similarly, Cleveland advances no basis for reviewing the district court's judgment denying his motion to remand this action to the state court. As the district court pointed out, "to say that this action is not brought for a refund of taxes or that the United States is not charging the tax is absurd

because, as the complaint alleged, the money was assessed pursuant to federal law regarding communication taxes, 28 U.S.C. §§ 4251-54" (A. 27a).

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari to the United States Court of Appeals for the Seventh Circuit in *Agron* (No. 71-807) and *Cleveland* (No. 71-777) should be denied.

Respectfully submitted,

HOWARD J. TRIENENS
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Attorneys for Illinois Bell Telephone Company

Of Counsel:
SIDLEY & AUSTIN

January 31, 1972

APPENDIX

24 Ill. Rev. Stat. (1969) §8-11-2:

§8-11-2. *Taxation of occupations or privileges*

The corporate authorities of any municipality may tax any or all of the following occupations or privileges:

1. Persons engaged in the business of transmitting messages by means of electricity, at a rate not to exceed 5% of the gross receipts from such business originating within the corporate limits of the municipality.

2. Persons engaged in the business of distributing, supplying, furnishing, or selling gas for use or consumption within the corporate limits of the municipality, and not for resale, at a rate not to exceed 5% of the gross receipts therefrom.

3. Persons engaged in the business of distributing, supplying, furnishing, or selling electricity for use or consumption within the corporate limits of the municipality, and not for resale, at a rate not to exceed 5% of the gross receipts therefrom.

4. Persons engaged in the business of distributing, supplying, furnishing, or selling water for use or consumption within the corporate limits of the municipality, and not for resale, at a rate not to exceed 5% of the gross receipts therefrom.

None of the taxes authorized by this Section may be imposed with respect to any transaction in interstate commerce or otherwise to the extent to which such business may not, under the constitution and statutes of the United States, be made the subject of taxation by this State or any political sub-division thereof; nor shall any persons engaged in the business of distributing, supplying, furnishing or selling gas, water or electricity, or engaged in the business of transmitting messages be subject to taxation under the provisions of this section for such transactions as are or may become subject to taxation under the provisions of

the "Municipal Retailers' Occupation Tax Act" authorized by Section 8-11-1; nor shall any tax authorized by this section be imposed upon any person engaged in a business unless such tax is imposed in like manner and at the same rate upon all persons engaged in businesses of the same class in the municipality, whether privately or municipally owned or operated.

Any of the taxes enumerated in this section may be in addition to the payment of money, or value of products or services furnished to the municipality by the taxpayer as compensation for the use of its streets, alleys, or other public places, or installation and maintenance therein, thereon or thereunder of poles, wires, pipes or other equipment used in the operation of the taxpayer's business.

For the purpose of the taxes enumerated in this section:

"Gross receipts" means the consideration received for the transmission of messages, the consideration received for distributing, supplying, furnishing or selling gas for use or consumption and not for resale, and the consideration received for distributing, supplying, furnishing or selling electricity for use or consumption and not for resale, and the consideration received for distributing, supplying, furnishing or selling water for use or consumption and not for resale, and for all services rendered in connection therewith valued in money, whether received in money or otherwise, including cash, credit, services and property of every kind and material and for all services rendered therewith, and shall be determined without any deduction on account of the cost of transmitting such messages, without any deduction on account of the cost of the service, product or commodity supplied, the cost of materials used, labor or service cost, or any other expenses whatsoever.

The words "transmitting messages", in addition to the usual and popular meaning of person to person communication, shall include the furnishing, for a consideration, of

services or facilities (whether owned or leased), or both, to persons in connection with the transmission of messages where such persons do not, in turn, receive any consideration in connection therewith, but shall not include such furnishing of services or facilities to persons for the transmission of messages to the extent that any such services or facilities for the transmission of messages are furnished for a consideration, by such persons to other persons, for the transmission of messages.

"Person" as used in this section means any natural individual, firm, trust, estate, partnership, association, joint stock company, joint adventure, corporation, municipal corporation or political subdivision of this State, or a receiver, trustee, conservator or other representative appointed by order of any court.

Illinois Messages Tax Act, 120 Ill. Rev. Stat. (1969) §§467.1-467.2:

§467.1 *Definitions*

For the purposes of this Act:

"Gross receipts" means the consideration received for the transmission of messages and for all services rendered in connection therewith, valued in money, whether received in money or otherwise, including cash, credits, services and property of every kind or nature, and shall be determined without any deduction on account of the cost of transmitting such messages, the cost of materials used, labor or service costs or any other expense whatsoever. However, any charges added to customers' bills pursuant to the provisions of paragraph (b) of Section 36 of "An Act concerning public utilities", approved June 29, 1921, as amended, or any charges added to customers' bills by taxpayers who are not subject to rate regulation by the Illinois Commerce Commission because of the tax that is imposed by this Act on any such taxpayer, shall be excluded in determining such

gross receipts. In case credit is extended, the amount thereof shall be included only as and when payments are received.

The words, "transmitting messages," in addition to the usual and popular meaning, include the furnishing, for a consideration, of services or facilities (whether owned or leased), or both, to persons in connection with the transmission of messages where such persons do not, in turn, receive any consideration in connection therewith, but do not include such furnishing of services or facilities to persons for the transmission of messages to the extent that any such services or facilities for the transmission of messages are furnished for a consideration, by such persons to other persons, for the transmission of messages.

"Department" means the Department of Revenue of the State of Illinois.

"Director" means the Director of Revenue for the Department of Revenue of the State of Illinois.

"Taxpayer" means a person engaged in the business of transmitting messages.

"Person" means any natural individual, firm, trust, estate, partnership, association, joint stock company, joint adventure, corporation, or a receiver, trustee, conservator or other representative appointed by order of any court, or any city, town, county or other political subdivision of this State.

§467.2 *Rate of tax—Interstate business exempt*

A tax is imposed upon persons engaged in the business of transmitting messages in this State at the rate of 5% of the gross receipts from such business, provided that any change in rate imposed by this amendatory Act of 1967 shall become effective only with bills having a date on or after August 1, 1967. However, such tax is not imposed

upon the privilege of engaging in any business in interstate commerce or otherwise to the extent to which such business may not, under the Constitution and statutes of the United States, be made the subject of taxation by this State.

111-2/3 Ill. Rev. Stat. (1969) §§36, 36(a), 36(b):

§36. *Change of rates—Notice—Suspension of rates—Temporary schedule—Charge for taxes*

* * * *

(a) Whenever a municipality pursuant to Section 8-11-2 of the Illinois Municipal Code, as heretofore and hereafter amended, imposes a tax on any public utility, such utility may charge its customers, in addition to any rate authorized by this Act, an additional charge equal to the sum of (1) an amount equal to such municipal tax, or any part thereof, (2) 3% of such tax, or any part thereof, as the case may be, to cover costs of accounting, and (3) an amount equal to the increase in taxes and other payments to governmental bodies resulting from the amount of such additional charge. Such utility shall file with the Commission a true and correct copy of the municipal ordinance imposing such tax; and also shall file with the Commission a supplemental schedule applicable to such municipality which shall specify such additional charge and which shall become effective upon filing without further notice. Such additional charge shall be made by the addition of a uniform percentage to the amounts payable for intrastate utility service in such municipality and shall be shown separately on the utility bill to each customer. The Commission shall have power to investigate whether or not such supplemental schedule correctly specifies such additional charge, but shall have no power to suspend such supplemental schedule. If the Commission finds, after a hearing, that such supplemental schedule does not correctly specify such additional charge, it shall by order require a refund to the appropriate customers of the excess, if any, with interest, in such man-

ner as it shall deem just and reasonable, and in and by such order shall require the utility to file an amended supplemental schedule corresponding to the finding and order of the Commission.

(b) Whenever the tax that is imposed upon a public utility engaged in the business of transmitting messages pursuant to Section 2 of The Messages Tax Act, or whenever the tax that is imposed upon a public utility engaged in the business of distributing, supplying, furnishing or selling gas for use or consumption pursuant to Section 2 of The Gas Revenue Tax Act, or whenever the tax that is imposed upon a public utility engaged in the business of distributing, supplying, furnishing or selling electricity for use or consumption pursuant to Section 2 of The Public Utilities Revenue Act, shall exceed the rate of 3% of the gross receipts, as defined in said Acts, respectively, from any such business, such utility may charge its customers, in addition to any rate authorized by this Act, an additional charge equal to the amount by which such tax exceeds 3%. Such utility shall file with the Commission a supplemental schedule which shall specify such additional charge and which shall become effective upon filing without further notice. Such additional charge shall be made by the addition of a uniform percentage to the amounts payable for intrastate utility service. The Commission shall have the power to investigate whether or not such supplemental schedule correctly specifies such additional charge, but shall have no power to suspend such supplemental schedule. If the Commission finds, after a hearing, that such supplemental schedule does not correctly specify such additional charge, it shall by order require a refund to the appropriate customers of the excess, if any, with interest, in such manner as it shall deem just and reasonable, and in and by such order shall require the utility to file an amended supplemental schedule corresponding to the finding and order of the Commission.

Internal Revenue Service Rulings

TREASURY DEPARTMENT
Washington 25.

Aug. 2, 1948

American Telephone and Telegraph Company
195 Broadway
New York 7, New York

Attention: Mr. Martin J. Karl

Gentlemen:

Reference is made to your letter of December 10, 1947, submitting on behalf of the Pacific Telephone and Telegraph Company and its exchange service customers in various municipalities in the State of Washington the following questions for Bureau rulings:

> "(1) Whether amounts billed to customers of telephone service in municipalities in the State of Washington which represent taxes paid to such municipalities by the company and which, pursuant to an order of the Department, are passed on to the customers on a pro rata basis, constitute amounts paid for telephone services and facilities subject to the taxes imposed by section 3465 of the Internal Revenue Code?
>
> "(2) Whether such amounts are deductible by customers for income tax purposes under section 23(c)(3) of the Internal Revenue Code and Sec. 29. 23(c)-1(b) of Regulations 111 where they are paid otherwise than in connection with the customers' trade or business?"

It is stated that the above questions arise by reason of an order issued on October 9, 1947, by the Department of Public Utilities of Washington authorizing the Pacific Telephone and Telegraph Company to bill on a pro rata

basis, to its customers in various municipalities in Washington, municipal occupation, business, excise and use of streets taxes imposed by such municipalities under the provisions of municipal ordinances.

Your letter enclosed copies of ordinances of the cities of Seattle, Spokane and Tacoma, relating to, and providing for, a license fee or tax upon certain businesses, occupations, pursuits and privileges, a copy of the Department's order describing the history of proceedings before the Department, the Superior Court of Thurston County in Washington, and the Supreme Court of the State of Washington prior to the order and setting forth the Department's findings and orders, and a photostatic copy of the portion of the Supreme Court's decision which relates to the passing on to customers, of payments to municipalities.

The evidence discloses that the taxes are levied upon the telephone company and represent payments which the company is required to make to the various municipalities in connection with its operations therein. Some of the taxes are based on gross receipts while others are specified annual and daily amounts. The taxes are universally considered proper items of operation expense, to be so considered by State rate-making authorities. The Department has the power to fix the special exchange rate applicable to the different municipalities, which will in effect require the rate payers in each municipality to absorb on a pro rata basis a sum equal to the amount of the tax the telephone company is required to pay such municipality.

Answering question No. (1), inasmuch as the payments which the telephone company must make to the various municipalities in connection with its operations therein, are considered proper items of operation expense; it is held that the pro rata shares of such payments the ratepayers are required to absorb, which are billed by the company

to its customers, constitute charges for telephone services and facilities subject to the tax imposed by section 3465 of the Code, as amended.

The answer to question No. (2) will be made the subject of a separate communication.

Very truly yours,

/s/

Commissioner.

U. S. TREASURY DEPARTMENT,
Office of Chief Counsel, Internal Revenue Service,
Washington, D. C. 23224.

Date March 15, 1968

In reply refer to:
CC:CL-3767/O:RJS

Mr. Victor E. Ferrall
General Tax Attorney
American Telephone and
Telegraph Company
195 Broadway
New York, N. Y. 10007

Re: Agron v. Illinois Bell Telephone Co.
and
American Telephone and Telegraph Company
U. S. D. C. Illinois, # 67C-2041
Your ref: C

Dear Mr. Ferrall:

This refers to your December 12, 1967 letter addressed to the Commissioner, the receipt of which has heretofore been acknowledged by this office. Attached to your cor-

respondence was a copy of a complaint filed recently in the United States District Court for Illinois against Illinois Bell Telephone Company, wherein the plaintiff, a subscriber, seeks a declaratory judgment respecting the determination of the Federal Communication Excise Tax charged and collected by that company. Also attached was a copy of a letter ruling dated August 2, 1948, which this Agency issued to American Telephone and Telegraph Company.

In response to your inquiry, you are advised that the current position of the Internal Revenue Service regarding the tax imposed by section 4251 of the Internal Revenue Code of 1954, is still represented by the aforementioned ruling, namely, that the payments which the telephone company must make to various municipalities in connection with its operations therein, are considered proper items of operation expense and therefore the pro rata shares of such payments billed by the company, which the ratepayers are required to absorb, constitute charges for telephone service subject to the Federal tax on communication services and facilities.

No decision has yet been reached with respect to the question of participation by the United States in the instant lawsuit. In this connection we acknowledge receipt of your letter of February 1, 1968, with which you forwarded a copy of the answer and third-party complaint filed in the above-entitled case. The matter is under consideration and we will let you know when any determination has been made with respect thereto.

Very truly yours,

/s/ Lester R. Uretz,
Lester R. Uretz,
Chief Counsel.

REV. RUL. 69-151,
1969-13 INTERNAL REVENUE BULLETIN 16
(March 31, 1969)

Advice has been requested whether certain amounts separately stated on customers' bills from telephone companies may be excluded in determining the amount upon which the Federal communications tax is imposed by Section 4251(a)(1) of the Internal Revenue Code of 1954. These amounts are attributable to State and local taxes (variously categorized as "gross receipts," "occupational," "message," etc., taxes) imposed on the telephone companies but passed on to the customers as separate charges.

Section 4251(a)(1) of the Code imposes a tax on certain communications services, including local telephone service. That section provides that this tax shall be paid by the person paying for the services.

Section 4252(a) of the Code provides that for purposes of the Federal communications tax the term 'local telephone service' means (1) the access to a local telephone system and the privilege of telephonic quality communication with substantially all persons having telephone or radio telephone stations constituting a part of such local telephone system, and (2) any facility or service provided in connection with a service described in (1).

Section 4254(a)(1) of the Code provides, with an exception not here material, that the amount on which the tax with respect to such services shall be based shall be the sum of all charges for such services included in the bill.

Unlike the Federal communications tax, which is imposed on the person paying for the service, the State and local taxes under consideration are imposed on the companies engaged in the business of providing the service. Since these taxes are directly attributable to the telephone

services provided; they constitute an element of the cost of providing the services along with the costs attributable to labor and equipment. The fact that amounts attributable to such taxes are passed on and are separately stated on bills sent to customers does not change the legal incidence of the taxes. Therefore, the practical effect of separately stating amounts attributable to State and local taxes on bills sent to customers is simply to identify an element of the total charges for the telephone services provided to such customers.

Accordingly, it is held that amounts attributable to the State and local taxes referred to above, which are imposed on telephone companies but are passed on to customers and separately stated on customers' bills, may not be excluded in determining the amount upon which the Federal communications tax is imposed by section 4251(a)(1) of the Code.